SIR GEORGE M'KENZIE's ARGUMENTS AGAINST An incorporating UNION Particularly Considered,

As they are in his OBSERVATIONS upon *James.* 6. Parl. 17.

Multa sunt & Maxima quæ propter Rerum Utilitatem transeo. Sed & sunt. Justin. l. 2 §. 10. Cod. de Vet. jur. enucl.

Edinburgh Printed in the Year 1706.
by Mr. Andrew Symeon.

SIR

GEORGE M'KENZIE's

ARGUMENTS

AGAINST

An incorporating UNION

Particularly Considered,

BRITISH MUSEUM

As they are in his OBSERVATI-
ONS upon *Jamer.* 6. *Par.* 17.

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Edinburgh Printed in the Year 1706.

Sir *George M'kenzie's* Arguments against an Incorporating *UNION*, particularly considered, *&c.*

SIR *George M'kenzie's* Arguments against an incorporating Union, have made such a noise of late, that 'tis worth while to look into them, how they are bottomed. This is so much the more necessary, now they are reprinted with a Letter of Recommendation. The Design of this certainly is, that they spread their Influence further, come into every *Body's* hand, and take deep impression, being ushered in with imaginary Fears of overturning Presbytery.

He would make us believe an Union of Parliaments cannot be concluded by both Parliaments; or if he can be brought over this, he must of necessity, have, at least, the Vote of every individual member. This was the trick the *Patricians* of old put upon the *Commons* of *Rome*: when they would needs have *Tribunes*, they were granted them, but

but with Condition, that each should have a Negative over the rest: And this Politick, defeated, in a great Measure, the whole Design: Now if it was thus with the Tribunes, who at the utmost did not exceed ten, what may we imagine the Case of a Parliament, made up of so many Men of different Interests? We must take private Byasses out of the World ere we can expect the inclinations of every Member in an Assembly run strait for the publick Good. Now, lest the Authority of so Great a man, lead people aside, and give them prejudices against a Design which may prove advantageous, we shall try on what sure ground he builds his opinion. I shall follow his Method, and take his Arguments as they lye.

1. His first Argument is thus, *The Parliament cannot overturn Fundamentals, But the Constitution of a Parliament is Fundamental, and therefore, cannot be overturned.* For Answer, I say first; what our Fundamentals are, is hard to determine; to know them aright we must run back to the Rise of our Government. The Conditions on which it was founded, are it's *Fundamentals*, but these are so covered over with the Rubbish of Time, that 'tis next to impossible to find them out: We have indeed some things declared *Fundamental*, and we ought to take them upon the word of the Sovereign, but how many other things do we see pass under that name, of which our forefathers were altogether ignorant?

But let us own a Parliamentarie Constitution to be *Fundamental*, that is, if we must of Necessity be ruled by the Queen (King) in a Parliament; after the Union we are so still: But such a *Fundamental, That Scotland must have a Scotish Parliament.* can only be understood, *while Scotland continues Separat*, and cannot extend to the Case of an Union. For, that the Scotish Parliament when incorporat with another shall act by it self, is a contradiction. Now, that no Nation can by any *Fundamental* bind up it self not to unite with another upon good considerations, seems evident. For *Fundamentals* are nothing else but pactions with the Soveraign (whether Monarch or Assembly) whereby the people in constituting the Soveraign power, reserve to themselves certain Conditions of Government; Now these

these, like all other voluntary Acts and pactions, must have for their Object, some *Good* to the parties contracting. And Consequently a Nation cannot oblige it self to continue in such a State as necessarily keeps it upon the decline, and draws on its ruine, no more than a man can be bound by paction to be miserable, or kill himself: Suppose then this a *Fundamental Law, That the Queen (King) in a Scottish Parliament shall govern Scotland*; it admits of this exception *unless Scotland unite with another Nation, to make up a greater Commonwealth, capable to secure the peace & happiness of both*: For since *to live happy*, is the very end and foundation of all Government, a *Fundamental*, that may one time or other overturn the foundation, cannot stand. And we see the forementiond supposed Fundamental was so interpreted, as not to hinder *Scotland* to unite unto the same Head with *England*: So that, *The Queen of Great Britain in a Scottish Parliament now governs* Scotland, why should it hinder *Scotland* to unite likewise into the same Body with *England*, *So that the Queen of Great Britain may in a British Parliament, govern* Scotland *and all* Britain?

It belongs therefore to the *Parliament* to fall upon means to deliver us from the inconveniencies we labour under, and from a sinking Condition, put us in the way of thriving, either by an Union, or any other way most expedient: Nor need they consult their constituents, for that were to own themselves incapable to discharge their Offices, and yet to follow the judgment of those, who are supposed much less capable: For how can it be thought private Gentlemen and Citizens are as well acquaint with the Circumstances of the Nation, the Springs of its misery and means of recovery, as the Members of *Parliament*, whose business it is? Ought the Steersman of a Ship in a Storm to quit the Helm, and go forsooth and consult with the Passengers what is fittest to be done?

Besides, such a Conduct, to consult Constituents, is altogether without precedent: Yea, does not the *Parliament*, in matters of the highest consequence, always go on without any such Ceremony? Did they in pronouncing King *James* the 3*d* Tyrant, or the Con-

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a Version of States (which 'tis impossible can have greater power than King and *Parliament* who have a foreign Power.) Did they, I say, advise with their Constituents, in declaring King *James* the 2d to have fallen from the Throne, and placing King *William* upon it? And yet I suppose these were Proceedings as extraordinary and remote to their Commissions, as that of an Union can be pretended.

Again, 'tis impossible any can have Right to be Directors or Supervisors of what passes in *Parliament*; For if the Barons and Citizens have any such Right, there must be some way of putting it in execution. For if it have no effect, it is a meer Fiction, and comes in being only to imagination. Now there is but two ways possible of exerting any such Right, either by interposing to stop the passing of an Act, or by protesting to exeem themselves from it, when past without their instructions: both which is absurd, for the one makes them superiour to the *Parliament*, and the other makes them lawless. And who does not see, That this Opinion of consulting Constituents strikes in directly with the old baffled Distinction of *Personal* and *Real Sovereignty*, which gives the Sovereign (whether Monarch or Assembly) only the drudgery of executing the Supreme Power, but lodges it originally in the People, who may take the Sovereign to Task, and call him to account when they please. A notion than which there can be nothing more ridiculous, as may appear to every body capable to observe Superiority and Subjection inconsistent in the same person.

2. To prove that the *Parliament* cannot conclude an entire Union, he brings two or three Instances, which we shall distinctly consider: And first, *Because the Parliament cannot enslave the Kingdom to a Foreigner:* I own it, and the Reason is plain; for that would be disposing upon anothers Right, the Title to the Crown belonging to the next Successor in the Royal Family; but in our case, they only dispose of themselves, and go in with their Neighbours to consult for the common Welfare of *Britain*.

His 2d Instance is, *That two of three Estates cannot exclude*

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the third; I own this too: But deny his inference: for if one Estate were excluded, then so much of the Nation would not be represented: But the *Parliament* must needs be the great Representative of all the Nation.

Now when our *Parliament* is united with that of *England*, all the Nation will notwithstanding be represented: The number that makes up the Representative may perhaps be less, but that does not alter the Case: For a Nation may bear truly represented by a Monarch as an Assembly of 1000 Senators. The Commissioners too for Shires and Burroughs are to go in together, which was their Primitive Constitution, and all Innovations may be as easily taken away, as they were at first introduced: But I might have spared my self the trouble of answering this Argument, for our Author liv'd to see it confuted, and one of the three Estates he here intends turn'd out, and it declared fundamental, they shou'd never be admitted afterward; And yet the *Parliament* was still the representative of the whole Nation: for when Episcopacy was abolished, their Clergy made up no part of the Nation in a civil capacity, and consequently could not be represented: So that our conduct all along makes it evident, nothing else is fundamental to our constitution, with reference to a *Parliament*, but that all the Nation, either in their own persons, or in the person of another, acting in their name, and by Commission from them, be present with the Soveraign, to give their consent to what Laws he is to enact.

His third instance, *That the Parliament from being absolute, by uniting, becomes subject to another; and that others have more influence upon their determinations than they themselves*, I must under favour deny this: for neither *Parliament* can be said to part with, or lose its Soveraignty by the Union, since the two Soveraignties will thereby be made or consolidated into one: And I cannot see how any thing can be subject to it self. And when the Partition walls of Independencies are taken away, the separat and interfering Jurisdictions removed, we are then made one people, having one interest and one inclination.

B 2

To prove, That special instructions and the consent of all the Nation is requisite in making an Union: he brings the example of Town-councils, which cannot incorporat Cities into one another without the full consent of all the People: I answer, The case is different: For Town-councils cannot unite Cities together, without the consent of the Soveraign that erected them, *Et unumquodq; eo modo dissolvitur quo colligatum est*, i. e. The knot (that binds Cities and Incorporations together) cannot be loosed but by the same hand that tyed it; now this is the Soveraign: And when the Councils go about to alter their constitution, the citizens have recourse to the Soveraign who granted them their Privileges: now Magistrates doing any thing contrair to the will of their Prince, are but as privat men, they cannot then exert Authority more than the Starrs shew light in face of the Sun; But our case is concerning a Soveraign Court, which has no power on earth to controul them.

Thus the *Parliament* cannot be guilty of the Statutory Treason, *in endeavouring to alter the power of the three Estates*. And indeed how such a case is possible, I cannot comprehend, For then the *Parliament* (which still takes in the Soveraign) must be both Party offended, Offender and Judge: That Treason therefore is meant of privat persons, who attempt to usurp over the *Parliament*, such as *Pitmedden* and any of that Kidney. Yea the Commissioners for the Union in 1604, who had such a Negative upon their Commission, not to treat of an Union, but only to talk as it were the two Nations together, by a Confederacy; whatever they did beyond the limits of their instructions, was at their own peril. But the *parliament* that limited them need not bound themselves but if they please: And these that deny the *parliament* a power of uniting, plainly endeavour to lessen the power of *parliaments*, thus they bring a Sword to cut their own Throats.

His next Argument to prove the necessity of special Instructions to conclude an Union, is from the civil Law. *The Commissioners for Shires and Burgos are the same with us, that Procuratores Universitatis in the civil Law, but these etiam cum libera, could not transact*

upon the Rights of their Constituents; And therefore much less our Commissioners, who have only a simple general Mandat, they must then have a special Mandate. I answer, his Authority from the civil Law is not well founded, For allowing our Commissioners to be Procurators *cum libera*, Such may exchange l. 58. *ff*; *de proc.* And consequently transact, which is nothing else but exchanging uncertain hopes for something in hand: Yea the *Administratores civitatum* are warranted to transact, l. 12. *c. de. transf.* which is our Case exactly, for these were persons commissionate by the free Cities to manage their business.

But since our Author is unwilling to allow them a Mandat *cum libera*, I shall not contest the point; For granting them only a simple general Mandate, such procurators are impowered to do every thing, that's for the advantage of the constituents, by his own confession; since therefore an Union may be their greatest interest, they may warrantably consent to it. And though it be not expresly, and in so many words, contained in their Commission, yet it follows of course, they are cloathed with a character to act every thing which probably makes for the peace and welfare of the Nation, But whosoever has right to the end, has right to the means of attaining it; *cui jus aliquod concessum est omnia quæ ad ejus exercitium necessaria sunt concessa videntur* l, 11. *ff. com: præd.* It belongs therefore to the Commissioners to be Judges of what it fittest to be done; And though they should be mistaken in the choice of means, yet their Constituents cannot complain, *nam sufficit quod utiliter gesserunt, etsi effectum non habuit negotium, l.* 10. §.1. *ff. d. Neg. Gest. i. e* they cannot be blamed who aim well, though they miss the Mark.

But what need to infer from the nature of their Commission a tacite Warrant? I make no doubt to affirm, That though they had expres instructions not to vote for an Union (or any other Act) they may notwithstanding warrantably break thorow these Limitations: For as the giving this or that person a Commission, depends on the pleasure of the Electors; so how far they are impowered by it, is determined by the Law: In the post they are placed, as Members of *parliament*, they must vote as their Conscience suggests, and

the good of the publick requires; And when they transgress the limits of their Commission, I see no remedy the constituents have: they will not, I fansy, presume to reduce the Law. Nay further, though they had expresly stipulate a penalty; yet the Commissioners cannot incurr it; for such pactions striking at the publick Law, can have no effect; And it were very hard a man should suffer for discharging his Duty to the publick; Yea though he had sworn to observe their instructions, he is obliged to break them, when he sees they interfere with the interest of the Common wealth *l. 5 c. d. leg.* Such confined, superficial and precarious Commissions, defeat the very design of *parliaments*, for if they can effectually prohibite their commissioners to vote an *Act* for the Union, why may they not by the same supposed power discharge them to pass any *Act* whatever. And thus we shall have two Estates full negative, and to the *parliament* incapable to do any thing; And is not this to lessen the power of *parliaments*, with a Witness?

The Laws in the digests, which he cites to prove a special mandate requisite, carry their answer along with them, For as 'tis said in *l. 7 ff. d. do:* *Filiusf donare non potest, neque si Liberam peculii administrationem habeat*; it is immediately added in § 1. *ibid. sed si justa ratione motus donet locus erit donationi:* to apply this to our purpose, 'tis just what we contend. The Commissioners cannot throw away the Priviledges of their Constituents and enslave them, yet they may upon just and valuable considerations make allowances to advance their interest: the other Law *l. 47 ff. d. cond. ind.* speaks of one who had a general commission but had gone about the business in his own name; and it's expresly said, that if he had acted in name of his Constituent, he had run no hazard.

Again he argues thus, *Commissioners for Shires and Burghs are only empower'd to represent 'em in the Parliament of Scotland, and therefore since by an Union, the Parliament of Scotland is no more, they cannot represent them at all.* I answer, That though the Shires and Burghs have the priviledge to send Commissioners, yet after they have constitute them, they have no more power over them: 'Tis the Soveraign's Prerogative to appoint where and when they shall Act; it were an odd kind of Model of

Government

Government, that the Queen muſt conſult the Shires and Burghs where ſhe is to hold *Parliaments*; this is a new Regulation indeed! Nor is the Being of the *parliament* of *Scotland* by an Union extinguiſhed, but incorporate with the *parliament* of *England*, to give Being to the *parliament* of *Britain*, where nothing can hinder the Commiſſioners to ſit; For as I ſaid, the conſtituents cannot intermeddle.

In the next place, our Author contends, "That though the Parliament had power to unite, yet if any one Member diſſent, the Union muſt ſtop; for though the legiſlative power be regulat by plurality of Votes, yet the Right to retain or reſign priviledges (ſuch as that of voting in Parliament) being founded on property, is not ſubject to Suffrage; And ſince a plurality cannot exclude any particular *Member*, by the ſame reaſon, no plurality can eſtabliſh an Union. This he illuſtrates from a *Society*, whoſe Members being free from Impoſitions by *Law*, tho' all the reſt ſhould ſubmit to pay, yet that could not oblige any one that refuſes. The like from a Community: Now ſince he builds much upon this Argument, which indeed is plauſible enough, we ſhall give it a full hearing, and diſmiſs it fairly; We are therefore to take notice

Firſt, That every Member of Parliament bears a twofold perſon. one, *Natural*, his own, as a privat Subject: Another, *Politick*, or *Artificial*, the perſon of thoſe he repreſents.

2*dly* "All Rights that belong to one, or all of the Members of Parliament in a private capacity, are cognoſcible by the Parliament it ſelf: For ſince, in that reſpect, all of 'em are Subjects, both themſelves, and what they pretend to, muſt fall under the Juriſdiction of the Soveraign power: Hence it is, that a ſoveraign Aſſembly can burden all its Members effectually with Taxes: they levy Subſidies in name of the Common-wealth, as being its Repreſentative: they are obliged to pay them, as being themſelves Members of the Common-wealth. Thus the Steerſman of a Ship acts in a different capacity from the other Paſſengers, as he ſits at the Helm, but is certainly one of them, as he paſſes the Seas.

3*dly*, *Even in caſes that concern themſelves, every Member muſt vote.* Upon the ſame grounds: For when he conſents to the paſſing

of Laws, he acts the part of a publick person; and his Constituents have Right to concurr in the *Legislative*, but they cannot do it any other way than by him on whom they devolv'd their Authority: Let us suppose all the Members of *Parliament*, and only they had been concerned in the *Darien* Colony: In making Laws about the Legality of its settlement, each Member behov'd certainly to vote, and the majority had carried it, and yet the question is concerning retaining or resigning of Property.

4thly; *A Commission to vote in Parliament is a privat Right*: For if we say the Commission belongs to a Commissioner as a publick person, that is, as a Member of *Parliament*, we make him Commissioner before he gets his Commission; And therefore this private Right must of necessity fall under the cognizance of the *Parliament*, as we have proven all private Rights of Members of *Parliament* must do: And consequently an *Act* about it, like all other Laws, must go by a Majority, by our Authors own confession. But *the Right to vote while they have a Commission*, is a publick Right and belongs to them as publick persons, and cannot be taken away by Suffrage: for 'tis grounded upon this fundamental Law, *That all Members of Parliament must have a Vote*: For to deny them a Vote, and yet own them Commissioners to the *Parliament*, that is, such as vote, is a contradiction, and therefore can produce no effect: Besides this would exclude their constituents from being represented in *Parliament*; for while one bears their person already, they cannot appoint any other: and this again destroys the very nature of a *Parliament*, which should be the Representative of all the Nation: In short, the *Parliament* must either deprive them of their Commissions, or allow them to vote. We have an instance not unlike this in the civil Law: while the Master allowed his Slave, Goods call'd *peculium*, his forbidding to contract with him was to no purpose: for he was obliged notwithstanding to those that trucked with his Slave, even after an express prohibition; and yet he could at pleasure have taken this *peculium* away, and so be no further oblig'd *l.* 29. § 1. l. 48. *ff. de pec.*

The only difficulty here is, how the *Parliament* can deprive a man of a Commission, or any other Right, that has not forfeited it;

it. But the prerogative of all Soveraignties will easily solve this: *Grotius* calls it *dominium eminens*; and it is the supream Jurisdiction, which the Soveraign power has over all the Rights of Subjects to dispose of them for the publick good: But such as are not taken into the *British Parliament*, may justly claim a valuable consideration: And since their Office is honorary, not lucrative, and cannot therefore be compensate with Money, some honourable Post or Title may do much to make up their Character.

I come now to the instances he brings to prove, the dissent of any one Member may stop the Union: His first, From a Society, each of whose Members maintains his Freedom from Taxes in spight of the test, does not answer the purpose; For since the priviledge of immunity is granted by the Soveraign Authority, all the *Acts* of a private Society are too weak to break the force of a publick Law, *jus publicum pactis privatorum mutari non potest*, *l.* 37. ff. *de pac.* His other instance from a Commonty, is, as forraign to the matter in hand: None of the Partners can be deprived his Right of using it: For he has still recourse to the Law, which will have it, *That a Commonty lye in common*; Nor can the nature of it be altered, on the same grounds; for the Law ordains *to use a commonty, but not to abuse it*: in short, no bodys Rights can be extorted from him by private men, for they are defended by the higher powers, to which all the inferiour must give way.

Thus it appears our Author builds too much upon these instances: our case is quite different: here, the soveraign power takes away a Commission to vote only a little before the time: for at the best, this priviledge is but frail, since not only their own death, but the first dissolution of *Parliament* puts an end to their Commission.

This much may serve as to Commissioners for Shires and Burghs, who have in their own person no share of the *Legislative*, but only in the person of those they represent. But what shall we say of our ancient and honourable Peers, that are, as natural Branches sprung from the root of Soveraignty; Sure, to lopp off so many as will be requisite to adjust the Representative, may seem dangerous, and 'tis to be feared they won't fall off of will: it wou'd appear these *pares curiæ* had a Right to be their Liedge-Lord's perpetual Counsellors.

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Hints indeed is the knot of the business; to unty which, I only offer this one Consideration: All that enter themselves Members of an Assembly, necessarily bind themselves to observe all its Fundamental Laws; if therefore it be the constitution of the Assembly, that all shall go by a majority, they that dissent are bound to acquiesce in, and approve what the greater Number has determined. 'Tis true, we see sometimes Protests put up, but these are only things of course and serve to transmit to posterity their private Sentiments. They are bound to give submission of their Will to what is voted by the majority, but may keep their Judgment and Conscience to be ruled by Reason: For the purpose: If an *Act* for an Union should be voted by the Majority in our *Parliament*, all that were against it at voting are obliged to submit to it, and all its consequences, when pass'd, as much as if they had expresly voted for it, since by their entering themselves Members of *Parliament* they sufficiently declared their Will to stand to what the majority should ordain. *Et quod semel placuit amplius displicere non potuit, Cap.* 11. *d. Reg. Jur: in 6to.* 'Tis in vain therefore to pretend they retain any Right of voting, which before hand they are obliged to quit, if the Union concluded by the majority require it: And since the Queen is not limited, 'tis hop'd our Nobility that are not taken into the *British* Parliament will rest satisfied: For 'tis not to be doubted, but in case of an Union, they will naturally fall under Her Majesties Royal consideration and care.

As to the Shires and Burrows, 2 or 3 whereof are perhaps to be canton'd into one, the same Answer may serve only with this difference; that they, by qualifying any by their commission to be Members of Parliament, have declared sufficiently their consent to be ruled by a Majority: They are oblig'd to own what their Commissioners act or are bound to act in their person, as much as if they had done the same things themselves, for they are the Authors of all they do by vertue of the commission, *qui facit per alium est perinde ac si faciat per seipsum. Cap.* 72 *d. Reg: Jur: in 6to:* And if their representative be proportioned to their assessment, they have no reason to complain, for this is the only Rule we have here to steer by, than which there is nothing more reasonable.

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Our Author again argues, "That if the Commissioners had pow-
'er to unite, they cou'd have debar'd the *Shires* and Burghs from
'being represented in the British Parliament: with Deference, I con-
ceive the contrair will follow: For if they consent to an Union of Par-
liaments, then they Vote that the Shires and Burghs, that makes
two thirds of the Parliament of *Scotland* be taken in.

To conclude, "He cannot see how it is possible to secure our
'Parliament, when it is join'd in with the Parliament of *England*,
'into one parliament of *Great Britain*: so that the parliament of
'*Britain* may not by plurality of Votes overturn any funda-
'mentals condescended on. I answer, if we have the Fundamentals
on which the Government of *Britain* is to be built, as well secured
as these of our own is now, we cannot complain: But as to reason
son the matter, we shall have them in so much the better fenced, as
the Nation of *Britain* will be more powerful to see Right done to
themselves, than we are at present: These Bonds 'twixt Prince &
People in their own nature but weak, may yet be made to hold, by
the danger, though not the difficulty of breaking them: They that
argue, The *English* are capable after an Union, to do us hurt, do not
consider, that then the distinct Soveraignty's are removed, the two
Parliaments made up intirely into one, we become one people & all
separat Interests done away: In such a case there's no room left for
Jealousies, no our voting separately is nay not been heard, since the
memory of Man, That the other Counties of *England*, for example,
party'd against *Wales*; and yet they were two distinct Nations, as
much as *England* and we at present: And in case of an Union, our
condition will be the same with theirs: 'Tis impossible the *English*
can then give us a Thrust, and not wound themselves; one part of
the Body can hardly suffer, and the whole not feel the pain: Indeed
were we only linked together by a Federal Union, we might be at
a loss how to find a Guarantee of the Treaty, who perhaps when
we had him, might be the first to play one Party against another; &
that they might no more fall out about Soveraignty's and Inde-
pendencies, as a righteous Peace maker, take care to have them
both depend upon himself: But in case of an entire Union, we

have

The few instances he sums up in the close, are either answered already, or the Difference betwixt them and the Case of an Union, is so clear, that it wants not to be particularly illustrated.

FINIS.